Supreme Court, U.S.
FILED
NOV 27 1985
JOSEPH F. SPANIOL, JR.
CLERK

85-881

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

RICHARD HALE AUSTIN,
Petitioner,

vs.

STATE OF TENNESSEE,
Respondent.

On Petition For A Writ of Certiorari To
The Court Of Criminal Appeals Of Tennessee

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Was the petitioner denied effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution?

2. Was the Petitioner denied due process of law, as guaranteed by Fourteenth Amendment to the United States Constitution, by the dismissal of the petition for a writ of error coram nobis without an evidentiary hearing?

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The respondent respectfully submits that the petition for a writ of certiorari filed in this cause should be denied.

OPINIONS BELOW

The unpublished opinions of the Court of Criminal Appeals of Tennessee and the Supreme Court of Tennessee appear in the appendix to the petition for a writ of certiorari to this Court.

JURISDICTION

Petitioner seeks to invoke this Court's jurisdiction under 28 U.S.C. § 1257. The respondent submits that this case does not present a substantial federal question.

STATEMENT OF THE CASE

The petitioner, Richard Hale Austin, was convicted in the Criminal Court of Shelby County, Tennessee, on October 22, 1977, and sentenced to death for the offense of murder in the first degree. The Supreme Court of Tennessee affirmed the judgment of the trial court on May 26, 1981, and a petition to rehear was denied on July 27, 1981. *State v. Austin*, 618 S.W.2d 738 (Tenn. 1981). On December 14, 1981, this Court denied a petition for a writ of certiorari. *Austin v. Tennessee*, 454 U.S. 1128.

On March 12, 1982, the petitioner filed a petition for a writ of error coram nobis in Criminal Court. (I. 21-22).* On March 26, 1982, the petitioner filed a petition for post-conviction relief in Criminal Court. (I. 34-44). The court conducted a hearing on the petitions December 6-8, 1983, and took the matter under advisement. (I. 145-147). On January 23, 1984, the court entered written findings of fact and conclusions of law and denied post-conviction relief. (I. 152-165). On February 29, 1984, the court entered an order dismissing the petition for a writ of error coram nobis nunc pro tunc as of January 23, 1984. (I. 169)

On April 17, 1985, the Court of Criminal Appeals of Tennessee affirmed the lower court judgment. (Appendix A-3 to Petition). On July 8, 1985, the Supreme Court of Tennessee denied the petitioner's application for permission to appeal. (Appendix A-1 to Petition). On September 5, 1985, the Supreme Court of Tennessee denied a petition to rehear. (Appendix A-2 to Petition). Execution of the petitioner's sentence of death has been stayed by the Supreme Court of Tennessee pending review of the instant petition.

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* References to the state post-conviction record will be indicated by volume and page number.

REASONS FOR DENYING THE WRIT

The respondent respectfully submits that the instant petition should be denied. The Court of Criminal Appeals of Tennessee did not decide any federal question of substance not heretofore determined by this Court or decide such a question in a way not in accord with the applicable decisions of this Court; nor did the Court of Criminal Appeals decide a federal question in a way in conflict with another court of last resort or of a federal court of appeals. *See* Supreme Court Rule 17.1. There being no special and important reasons for a grant of certiorari in this case, the Court in its sound discretion should deny the writ sought here.

A.

In the first question presented to this Court, the petitioner contends that he was denied the effective assistance of counsel at trial as guaranteed by the Sixth Amendment. Specifically, he contends that his trial attorney rendered ineffective assistance of counsel by (1) failing to make adequate factual investigations and interview potential witnesses; (2) failing to cross-examine or adequately cross-examine the State's witnesses; (3) failing to make timely objections to inadmissible evidence; (4) submitting the motion for a new trial without argument and without reading the trial transcript; (5) failing to allow appellate counsel an opportunity to submit Jack Charles Blankenship's affidavit in the motion for a new trial; (6) acting in bad faith in refusing to honor an agreement with appellate counsel to continue a hearing date for the motion for a new trial; (7) making comments about his client in open court after the motion for a new trial was overruled, evidencing conflicting considerations in the lawyer-client relationship; and (8) depriving the petitioner of a substantial defense by failing to call Jack Charles Blankenship as a defense witness.

The Court of Criminal Appeals reviewed these claims and determined for the reasons stated in the opinion (Appendix A-3

to Petition, pp. 3-17) that the petitioner had failed to show that trial counsel's performance was deficient or that the performance prejudiced the defense. In the recent case of *Strickland v. Washington*, 466 U.S. ____, 104 S.Ct. 2052 (1984), this Court held that a convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction requires that the defendant show, first, that counsel's performance was deficient, and, second, that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial. *Id.* at 2064. In order to prove a deficient performance by counsel, a defendant must prove that counsel's representation fell below an objective standard of reasonableness. *Id.* at 1065. A reviewing court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Id.* at 2065-2066. In order to prove prejudice, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 2068. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* at 2068. A court hearing the effectiveness claim must consider the totality of the evidence. *Id.* at 2069.

Viewed under light of these principles, the record clearly shows that counsel's representation fell within the wide range of reasonable professional assistance; furthermore, even assuming a deficient performance by counsel, the petitioner failed to show a reasonable probability that, but for any errors, the result of the proceeding would have been different. Accordingly, the Court of Criminal Appeals properly rejected the petitioner's contentions on this issue, and the granting of certiorari is unwarranted.

B.

In the second question presented for review, the petitioner contends that he was denied due process of law by the dismissal of his petition for a writ of error coram nobis without an evidentiary hearing.

This issue was not presented to the state courts in the context of a federal constitutional claim, but merely as a claim of error under state law. It is well-settled that this Court will not consider issues not pressed or passed on below. *Monks v. New Jersey*, 398 U.S. 71 (1970). Accordingly, the instant contention by the petitioner should not be considered.

Furthermore, the Court of Criminal Appeals of Tennessee decided the instant issue as a matter of state law. It is well-settled that this Court will not review decisions of a state court which rest upon adequate non-federal grounds. *Young v. Ragen*, 337 U.S. 235, 238 (1949). Accordingly, the granting of certiorari on this issue is unwarranted.

CONCLUSION

For the reasons stated herein, the respondent respectfully submits that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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